No. 13654

In the United States Court of Appeals for the Ninth Circuit

United States of America, *Appellant*

v.

Gerald J. Trubow, *Appellee*

Appeal From the United States District Court for the Northern District of California, Southern Division

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SUPPLEMENTAL BRIEF FOR APPELLANT

Holmes Baldridge,
Assistant Attorney General.

Chauncey F. Tramutolo,
United States Attorney.

Frederick J. Woelflen,
Assistant United States Attorney.

Paul A. Sweeney,
Massillon M. Heuser,
Morton Hollander,
Attorneys,
Department of Justice.

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PAUL P. O'BRIEN

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SUPPLEMENTAL BRIEF FOR APPELLANT

STATEMENT

This action under the Federal Tort Claims Act arises out of personal injuries sustained by appellee while operating a freight elevator in the course of removing surplus goods purchased by him at a Marine hospital in San Francisco. This is the second time this case is before this Court.

The facts in this case are summarized in the brief we filed in Appeal No. 12955, when this case was first

before this Court (R. 158).[1] On that first appeal we advanced three main arguments:

1. The district court's findings of fact, incorporating by reference the general allegations of the complaint and lacking a specific finding as to contributory negligence, were conclusory and too indefinite to support the court's ruling that the United States was liable.

2. There was absolutely no evidence which would justify the entry of the more specific findings essential to a holding that the United States was liable for the allegedly defective condition of the freight elevator. The particular defect alleged was the absence of a suitable strap by which the elevator doors could be closed by plaintiff. We urged that the type of liability imposed on the Government by the district court could rest only on the Government's superior knowledge of the existence of the claimed defect on its premises (pp. 10-13 of our brief in No. 12955). And we showed that the evidence did not support any finding as to actual knowledge of the defect or its continued existence for a period of time long enough to charge the United States with constructive knowledge.

3. In any event, there could be no liability on the part of the United States under the Tort Act because the individual employee allegedly responsible for appellee's injuries was himself under no personal liability to the appellee for those injuries.

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[1] By stipulation filed in this Court, it has been agreed that the briefs in the former appeal may be used as the briefs in the instant appeal and that the parties may file supplemental briefs (R. 158-159).

This Court accepted our first contention and did not pass on the other two arguments. It reversed the district court judgment and remanded the case to the district court with instructions to make a specific finding on the issue of contributory negligence and to make additional specific findings of fact with respect to the other issues instead of basing its findings merely on the general allegations set forth in the complaint (196 F. 2d 161; R. 148).

On remand, the district court reentered judgment against the United States. This time, in conformity with this Court's instructions, the lower court made definite findings of fact. The court found that at the time of the accident the strap used to close the elevator door was torn and inadequate or missing and that the United States "knew or should have known" it "was missing" (R. 152). The court also found that the appellee was not guilty of contributory negligence.

ARGUMENT

We submit that each of the two contentions not passed upon by this Court when the case was first here warrants reversal of the second judgment entered by the district court.

A. The Findings of the District Court Are Not Supported by the Evidence.

The essential finding on which governmental liability was predicated was the actual or constructive knowledge on the part of the United States as to the existence of the defect. Such a finding is no more than an inference or conclusion deduced from the asserted absence of the strap a few days after the accident, and, therefore,

is not entitled to the protection of Rule 52(a) of the Federal Rules of Civil Procedure. That Rule does not "entrench with finality the inferences or conclusions" drawn by the trial court from the facts. *Kuhn* v. *Princess Lida,* 119 F. 2d 704, 705 (C.A. 3); *In re Kellett Aircraft Corp.,* 186 F. 2d 197, 200 (C.A. 3); *St. Louis Union Trust Co.* v. *Finnegan,* 197 F. 2d 565, 568 (C.A. 8).

Moreover, even if such a finding is protected by Rule 52(a), that Rule provides for the setting aside of "clearly erroneous" findings of fact. "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States* v. *Gypsum Co.,* 333 U. S. 364, 395.

All of the evidence in this case, when measured against the district court's finding, compels the conclusion that such "a mistake has been committed." Our first brief in this case shows a complete failure to prove any actual knowledge of the defect and a similar failure to prove that the defect had continued for a period of time long enough to charge the Government with constructive knowledge. (pp. 12-13 of our brief in No. 12955)[2]. And no attempt was made by the appellee to supply this proof when the case was again before the court below on remand.

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[2] The record also affirmatively establishes, as we have earlier pointed out at pp. 13-14 of our first brief, that the plaintiff did not exercise reasonable care for his own safety in operating the elevator. For the reasons set forth in detail in that brief, we submit that the judge's finding to the contrary is clearly erroneous.

This failure of proof means that the judgment below cannot stand. A recovery in this case can be justified in California, where this accident occurred, only where it is shown that the landowner had actual knowledge that a dangerous condition existed or that the dangerous condition continued for a sufficiently long period of time to charge him with constructive knowledge. See cases collected at pages 11-12 of our first brief. Recently, Judge Yankwich applied this rule by denying recovery in a similar case in California because "there was no evidence in the record showing" that the dangerous condition had existed for "a sufficient length of time to be noticeable so as to charge the defendant with knowledge" in failing to discover it. *McGregor* v. *Sears, Roebuck & Co.*, 107 F. Supp. 918, 919 (S. D. Cal.).

The rule, of course, is not confined to California. The California cases simply follow "the general rule in this country" under which it must be shown that "the defendant knew, or should have known, of the dangerous condition." *Ernst* v. *Jewel Tea Co.*, 197 F. 2d 881, 884 (C.A. 7). Again, in *Parks* v. *Montgomery Ward Co.*, the Court of Appeals for the Tenth Circuit stressed the fact that "where there was no showing as to how long the condition existed, or whether defendant had actual knowledge of its existence," it was compelled to hold that "plaintiff failed to establish actionable negligence on the part of the defendant." 198 F. 2d 772, 775 (C.A. 10). The failure of proof in the instant case calls for an identical holding here.

B. The Only Type of Liability for Which the Government May Be Held Liable under the Federal Tort Claims Act Is a Respondeat Superior Liability.

The Government, for reasons set forth in our earlier brief, is not in all cases under the Federal Tort Claims Act subject to the landowner's special liability for the defective condition of his premises. Only in those cases where the individual federal employee himself would be under personal liability to the injured plaintiff does the language of the Federal Tort Claims Act allow liability to be imposed on the Government under the *respondeat superior* theory. (See pp. 17-25 of our first brief.) The Court of Appeals for the Fifth Circuit, in emphasizing the correctness of this position, recently noted that "the Act merely subjects the Government to the same liability as the delinquent employee in accordance with the local law." *In Re Texas City Disaster Litigation,* 197 F. 2d 771, 776 (C.A. 5), pending on certiorari, No. 308, 1952 Term, Supreme Court.[3]

Application of that test leaves no room for doubt that the United States cannot be held liable here because the allegedly delinquent employee was himself under no liability to the appellee. Any liability on the em-

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[3] Parts of the opinion in *United States* v. *Hull,* 195 F. 2d 64 (C.A. 1) reject the view that the United States may be held liable under the Tort Claims Act only where the employee is himself liable to the plaintiff. The *Hull* opinion was also adopted by the Third Circuit in *Jackson* v. *United States,* 196 F. 2d 725. But the pertinent language in the *Hull* case is clearly *dicta,* because the court there specifically held that the employee in that case, whose negligence caused plaintiff's injuries, was under an affirmative duty to act with care and to avoid injury to the plaintiff and would presumably be personally liable to the plaintiff for the negligent discharge of that duty.

ployee's part would, of course, be based on negligence in failing to detect the absence of the strap and the failure to supply a new strap. Liability for negligence is, of course, predicated on the failure to use reasonable care in circumstances where it is apparent that such failure will bring about a serious likelihood of injury to the plaintiff. The evidence, however, showed that the freight elevator was not a *public* elevator. To the contrary, its use was ordinarily restricted to hospital personnel, all of whom were familiar with the working of the elevator doors and knew that pulling on the top half of the door would cause the lower half to come up from the floor.

Consequently, even if the inside strap was actually missing, the employee charged with the duty of detecting and repairing that defect could not reasonably be expected to apprehend that his failure to supply a new strap would be likely to cause injury to the users of the elevator. He could reasonably assume that those users, knowing that the two halves of the door met in the center, would not, while inside the elevator, reach out and try to use the outside handle but would have someone close the doors from the outside. Or, he could reasonably assume that if the outside handle were used by someone inside the elevator, that person, knowing the two halves come together, would not pull down the upper half with "full force," as did the appellee (R. 63), but would pull down gradually so as to enable him to get his hand back inside the elevator before the two halves met. In these circumstances, the failure either to detect the absence of the strap or to supply a new

strap does not constitute negligence on the employee's part. We submit that his resulting immunity from any personal liability to the plaintiff prevents imposition of liability on the United States under the Federal Tort Claims Act.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be reversed with directions to dismiss the complaint and enter judgment for the United States.

HOLMES BALDRIDGE,
Assistant Attorney General.
CHAUNCEY F. TRAMUTOLO,
United States Attorney.
FREDERICK J. WOELFLEN,
Assistant United States Attorney.
PAUL A. SWEENEY,
MASSILLON M. HEUSER,
MORTON HOLLANDER,
Attorneys,
Department of Justice.

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